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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 897

WALTER A. YOUNGE, M.D.,
Petitioner,

vs.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent adopts petitioner's statement of the case and the matters set forth in the petition as required by U.S. Sup. Ct. Rule 40-1(a), (b), (c) and (d), with the exception hereinafter noted.

STATUTES INVOLVED

Most of the provisions of Paragraph 2 of Section 334.100, R.S. Mo., set out on pages 3 and 4 of the petition were effectively repealed in 1965 by the Seventy-Third General Assembly of Missouri when it enacted Senate Bill 284, Laws of Missouri, 1965, p. 277.

Section 3 of said bill (now codified as Section 161.272, R.S. Mo. Cum. Sup. 1967) reads in pertinent part:

> "The administrative hearing commission shall conduct hearings and make findings of fact and conclusions of law in those cases wherein, under the law, a license issued by any of the following agencies may be revoked or suspended or wherein the licensee may be placed on probation or wherein an agency refuses to permit an applicant to be examined upon his qualifications or refuses to issue or renew a license of an applicant who has passed an examination:
>
> * * *
>
> State Board of Registration for the Healing Arts. . . ."

Section 11 of said bill (not codified by the Revisor of Statutes but contained in *Laws of Missouri, 1965*, p. 280) reads as follows:

> "Section 11. Any provisions of existing statutes pertaining to the administrative agencies listed in Section 3 (161.272) which are in conflict with this act are repealed."

Section 5 of said bill (now codified as Section 161.292, R.S. Mo. Cum. Sup. 1967) reads in pertinent part:

> "Upon a finding in any cause charged by the complaint for which the license may be suspended or revoked as provided in the statutes and regulations relating to the profession or vocation of the licensee, the commis-

sion shall deliver or transmit by certified mail to the agency which issued the license the record of the proceedings before the commission together with the commission's findings of fact and conclusions of law. The commission may make recommendations as to appropriate disciplinary action but any such recommendations shall not be binding upon the agency."

REASONS FOR DENYING THE WRIT

I.

Revocation of Petitioner's License After His Acquittal of the Criminal Charge of Abortion Did Not Violate His Rights Relating to Double Jeopardy.

This Court has very recently said that the Fifth Amendment guarantee against double jeopardy consists ". . . of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, (1969) 395 U.S. 711, 23 L.Ed. 2d 656, 664-665, 89 S.Ct. ____. Hence, if petitioner's contention were correct, a physician *convicted of abortion* would be immune from subsequent license revocation proceedings based on the same act, because such proceedings would constitute "multiple punishments".

However, revocation of a physician's license in Missouri is not effected to punish the physician, but rather to protect the public. This was the subject of extended discussion in the opinion of the Missouri Supreme Court in this case. In the opinion, the Court once again repeated that two early cases characterizing the revocation statute as penal were overruled: *State ex rel. Spriggs* v. *Robinson*, (1913) 253 Mo. 271, 161 S.W. 1169; *State ex rel. Johnson*

v. *Clark*, (1921) 288 Mo. 659, 232 S.W. 1031. In this case, the Supreme Court of Missouri said (R. 521; Petition, Appendix A5-6):

> "Insofar as Spriggs and Johnson held the statute to be penal, they have been overruled. Hughes v. State Board of Health, Mo., 159 S.W. 2d 277; Gaddy v. State Board of Registration, Mo.App., 397 S.W. 2d 347; Bittiker v. State Board of Registration, Mo.App., 404 S.W. 2d 402; State ex rel. Lentine v. State Board of Health, Mo., 65 S.W. 2d 943. In Hughes, the court directly held that (in this respect) the Spriggs case had been overruled, that the statute was one 'for the protection of the public in safeguarding public health,' and that it was not an imposition of punishment. Counsel for appellant seems to doubt the effect of these later decisions. If any doubt remains, and there should be none, we now hold that our revocation statute is *not* penal in nature and we reaffirm the later doctrine as just stated. In this view, it is wholly unnecessary to consider the many authorities cited from other states for our own policy is established. These revocation proceedings are not penal, they are not 'quasi-criminal', they do not contemplate 'punitive' sanctions and the provisions against double jeopardy do not apply. The appellant is not being tried again for the same 'offense'. He is not, in fact, being tried for any offense."

Petitioner argues, with respect to double jeopardy, that he is protected by the principle "that an acquittal in a criminal prosecution bars a subsequent civil action imposing punitive sanctions." Petitioner then concedes that the "applicability" of his argument "depends upon whether the physicians' license revocation statute under Mo. Rev. Stat., §334.100 is construed as penal in nature."

It is submitted that this concession alone would require the denial of the writ on this point because this Court traditionally accepts the construction accorded to a state

statute by the highest court of that state. *Adderley* v. *Florida,* (1966) 385 U.S. 39, 46, 17 L.Ed. 2d 149, 155, 87 S.Ct. 242; *Lerner* v. *Casey,* (1958) 357 U.S. 468, 471, 2 L.Ed. 2d 1423, 1427, 78 S.Ct. 1311; *Barsky* v. *Board of Regents of N. Y.,* (1954) 347 U.S. 442, 448, 98 L.Ed. 829, 837, 74 S.Ct. 650.

Moreover, this Court has explicitly held that the "question" of whether a particular statute imposes a criminal or remedial sanction "is one of statutory construction." *Helvering* v. *Mitchell,* (1938) 303 U.S. 391, 399, 82 L.Ed. 917, 922, 58 S.Ct. 630. Inasmuch as the Supreme Court of Missouri has said "that our revocation statute is *not* penal in nature" (R. 521; Petition, Appendix A5), it is submitted that this Court should not undertake to construe it differently.

But respondent need not rely upon this Court's custom of deferring to an interpretation of a state statute given by the highest court of that state, for this Court has long held that statutes of the type here under scrutiny impose remedial rather than criminal sanctions and therefore do not violate double jeopardy.

It is undoubtedly true that the revocation of a practicing physician's license works a hardship on him and that he is not to be deprived of the privileges conferred by such license without procedural due process. *In re Ruffalo,* (1968) 390 U.S. 544, 20 L.Ed. 2d 117, 88 S.Ct. 1222. But any such hardship results as an adjunct to the fulfillment of the fundamental purpose of license revocation procedures, i.e., the protection of the public by the exercise of the police powers of the state. As this Court observed in *Flemming* v. *Nestor,* (1960) 363 U.S. 603, 616, 4 L.Ed. 2d 1435, 1447-1448, 80 S.Ct. 1367:

> "Similarly, the setting by a State of qualifications for the practice of medicine, and their modification from time to time, is an incident of the State's power to pro-

> tect the health and safety of its citizens, and its decision to bar from practice persons who commit or have committed a felony is taken as evidencing an intent to exercise that regulatory power, and *not a purpose to add to the punishment of ex-felons.*" (Emphasis added).

In support of the foregoing, the Court cited *Hawker* v. *State of New York*, (1897) 170 U.S. 189, 42 L.Ed. 1002, 18 S.Ct. 573, wherein this Court rejected an argument that a statute prohibiting a convicted felon from practicing medicine, which statute was enacted after the conviction, added to his punishment and was therefore an ex post facto law. There the Court said, 170 U.S. 189, 196, 42 L.Ed. 1002, 1006, "The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation, of law. The former is merely the prescribed evidence of the latter."

The instant case is directly analogous. Section 334.100, R.S. Mo. Cum. Sup. 1967 (Petition, p. 3), authorizes respondent to revoke a license for unprofessional and dishonorable conduct and provides in part:

> "Without limiting the foregoing general language, the following specifications shall be deemed unprofessional and dishonorable conduct within the meaning of this section:
>
> * * *
>
> "(3) Committing an unlawful abortion; . . ."

In the instant case, the "committing of an unlawful abortion . . ." was the "prescribed evidence" of unprofessional and dishonorable conduct warranting revocation. Conviction or acquittal of the felony of abortion was not an issue.

In *Helvering* v. *Mitchell,* (1938) 303 U.S. 391, 82 L.Ed. 917, 922, 58 S.Ct. 630, 633, this Court specifically held that the fifty percent penalty on evaded income tax, sought in a civil action after an acquittal on criminal charges, did not violate the principle of double jeopardy because it was a civil and not a criminal sanction. At 303 U.S. 399-400, 82 L.Ed. 922, the Court said, "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted." By way of a footnote illustrating this point, the Court said "Disbarment is likewise a sanction of this type. Ex parte Wall, 107 U.S. 265, 27 L.Ed. 552, 2 S.Ct. 569." And at 303 U.S. 404, 82 L.Ed. 925, the Court said ". . . finally, in the civil enforcement of a remedial sanction there can be no double jeopardy."

Holdings similar to *Helvering* v. *Mitchell,* supra, are found in other cases, including: *United States ex rel. Marcus* v. *Hess,* (1942) 317 U.S. 537, 548-549, 87 L.Ed. 443, 451-453, 63 S.Ct. 379, wherein the Court rejected a double jeopardy argument in an informer suit for forfeitures of money and double damages after the defendant had been convicted of a crime arising out of the same acts. The Hess case is of particular interest because the Court acknowledges that enforcement of the statute may have the incidental effect of punishing the wrongdoer, ". . . but this is not enough to label it as a criminal statute." Id. 317 U.S. at 551. And see *Rex Trailer Co.* v. *U. S.,* (1956) 350 U.S. 148, 100 L.Ed. 149, 76 S.Ct. 219, wherein, after a conviction for fraudulently obtaining surplus war materials, the defendant company was held liable for a recovery of two thousand dollars on each of its five purchases, in spite of the absence of a showing of any actual damages and defendant's plea of double jeopardy.

On the basis of the foregoing, it is submitted that the opinion of the Missouri Supreme Court is in perfect ac-

cord with the decisions of this Court. The cases cited by the petitioner to the contrary are readily distinguishable (Petition, p. 11): *Cummings* v. *Missouri*, (1867) 71 U.S. 270, 18 L.Ed. 356, and *Ex parte Garland*, (1867) 71 U.S. 333, 18 L.Ed. 366, for the reasons stated in *Hawker* v. *State of New York*, supra, 170 U.S. 189, 198-199; *Bridges* v. *Wixon*, (1945) 326 U.S. 135, 154, 89 L.Ed. 2103, 65 S.Ct. 1443, 1452, which condemns the use of unsworn written statements in deportation proceedings; *Jordan* v. *De George*, (1951) 341 U.S. 223, 231, 95 L.Ed. 886, 892, 71 S.Ct. 703, 708, which held that the vagueness doctrine must be applied to a statute stating grounds for deportation of aliens because of the "grave nature of deportation"; *Fong Haw Tan* v. *Phelan*, (1948) 333 U.S. 6, 10, 92 L.Ed. 433, 436, 68 S.Ct. 374, 376, which accorded to a deportation statute "the narrowest of several possible meanings" because "the stakes are considerable . . ."; *Kennedy* v. *Mendoza-Martinez*, (1963) 372 U.S. 144, 9 L.Ed. 2d 644, 83 S.Ct. 554, which held unconstitutional certain statutes which permitted forfeiture of citizenship for leaving the country to evade the draft because they imposed punishment without requiring procedural due process; *Spevack* v. *Klein*, (1967) 385 U.S. 511, 17 L.Ed. 2d 574, 87 S.Ct. 625, wherein it was held that disbarment of an attorney upon grounds that he had asserted his right not to incriminate himself in a judicial proceeding violated his rights under the Fifth and Fourteenth Amendments.

The most that can be said for any of these cases is that they require a degree of fairness in the conduct of the proceedings commensurate with the importance of the matter in issue, i.e. procedural due process, which is not an issue here. In none of the cases did the Court hold that the proceedings violated the principle of double jeopardy, in spite of the fact that several grew out of or were closely related to criminal prosecutions.

Similarly, petitioner makes the broad claim that if he had been acquitted in some state which regards its revocation statute as penal, the principle of double jeopardy would have prevented the revocation of his license. None of the cases cited by petitioner on this proposition so hold (Petition, pp. 9-10). What those cases, with the exception of *In re Kindschi*, (1958) 52 Wash. 2d 8, 319 P. 2d 824, do hold is that *for purposes of statutory construction* revocation statutes are regarded as penal and are therefore strictly construed in favor of a physician on such issues as whether the acts alleged constitute a violation of the statute. The *Kindschi* case, supra, characterized revocation proceedings as quasi-criminal, yet affirmed a suspension of the physician's license for a conviction of attempting to evade the payment of federal income taxes. It is submitted that petitioner's reliance upon these cases cannot be persuasive on the issue at hand. A rule adopted to facilitate statutory construction cannot be elevated to the stature of a constitutional requirement by its use of the word "penal". The fact that some states hold that a physician will be given the benefit of the doubt in the interpretation of revocation statutes by no means constitutes a holding that a physician acquitted—or convicted—of a felony is thereafter protected from having his license revoked by the rule against double jeopardy.

It is therefore respectfully submitted that the revocation of petitioner's license in the instant case, being a remedial sanction for the protection of the public, does not violate his right to the protection of the double jeopardy clause of the Fifth Amendment. In the words of the Court below ". . . the provisions against double jeopardy do not apply. The appellant is not being tried again for the same 'offense'. He is not, in fact, being tried for any offense." (R. 521; Petition, Appendix A5-6).

II.

Petitioner's Acquittal of the Criminal Charge of Abortion Did Not, under the Principles of Res Judicata or Collateral Estoppel, Bar This Respondent from Maintaining Administrative Proceedings Leading to the Revocation of Petitioner's License As a Physician. Moreover, Such Issue Raises No Federal Question.

In *Hoag* v. *New Jersey*, (1958) 356 U.S. 464, 470, 2 L.Ed. 2d 913, 919, 78 S.Ct. 829, this Court said:

> "A common statement of the rule of collateral estoppel is that 'where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.' Restatement, Judgments, §68(1)."

An essential element of the foregoing definition is that, to be conclusive, the determination must be between the same parties. Such was not the case here. In the criminal proceeding, the State of Missouri was the plaintiff; in the license revocation proceeding, the Board of Registration for the Healing Arts was the moving party. The Board is not the State of Missouri; and the Supreme Court of Missouri, in *Gaddy* v. *State Board of Registration for the Healing Arts*, (Mo.Sup., 1965) 394 S.W. 2d 284, said of a contention to the contrary: "This is incorrect and Respondent's motion to transfer to the Court of Appeals must be sustained. The party involved is the Board which is *an artificial legal entity in the nature of a quasi public corporation.*" (Emphasis added). The Supreme Court of Missouri took the same position in its opinion herein (R. 523, Petition, Appendix A8).

But an even more fundamental reason exists which prevents the application of the principles of collateral

estoppel and res judicata to the instant case: an acquittal in a criminal case is not a determination of a "fact essential to the judgment" in a subsequent proceeding of this nature. In other words, petitioner's acquittal of the criminal charge does not amount to a determination that he did not perform the abortion.

As this Court said in *Lewis* v. *Frick*, (1914) 233 U.S. 291, 301-302, 58 L.Ed. 967, 973, 34 S.Ct. 488:

> "... *the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.* The distinction between a criminal prosecution and an administrative inquiry by an executive department or subordinate officers thereof has been often pointed out." (Emphasis added).

Similarly this Court held in *Helvering* v. *Mitchell*, (1938) 303 U.S. 391, 397, 82 L.Ed. 917, 921, 58 S.Ct. 630, that a prior acquittal in an income tax evasion prosecution was not res judicata as to a subsequent civil proceeding for the fifty percent penalty, saying "it (the acquittal) did not determine that Mitchell had not willfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." (Parenthetical matter supplied.) See also *Murphy* v. *U. S.*, (1926) 272 U.S. 630, 632-633, 71 L.Ed. 446, 457, 47 S.Ct. 218.

Helvering v. *Mitchell*, supra, 303 U.S. 391, 405-406, 82 L.Ed. 917, 925-926, also effectively distinguishes *Coffey* v. *U. S.*, (1886) 116 U.S. 436. 29 L.Ed. 684, 6 S.Ct. 437, on which petitioner principally relies, by saying that the rule of *Coffey* presents no "obstacle" to a subsequent action "imposing a civil administrative sanction."

In *Hoag* v. *New Jersey*, supra, this Court, noting that "jury verdicts are sometimes inconsistent or irrational", declined to hold that collateral estoppel is a constitutional requirement. *Hoag* involved a criminal prosecution for an armed robbery of one of five individuals after an acquittal of an indictment for the simultaneous robbery of three of the five. The evidence was the same in both cases, and the defendant relied on the same alibi in both. This Court said that ". . . we would have to embark on sheer speculation in order to decide that the jury's verdict at the earlier trial necessarily embraced a determination favorable to the petitioner on the issue of 'identity'." 356 U.S. 464, 472, 2 L.Ed. 2d 913, 920.

In the instant case, the evidence before the Administrative Hearing Commission was substantially the same as that adduced on the criminal trial. However, there were some differences, an example of which is discussed in respondent's brief before the Supreme Court of Missouri, as follows (R. 511-512):

> "Further corroborating Margaret's testimony and casting further doubt on the veracity of Dr. Younge and Mrs. Eutz was the evidence concerning the 'many' burned areas within Margaret's vagina. When Dr. Fischer testified for the prosecution in the criminal case, he was not asked either on direct or cross-examination about the presence or absence of the necrotic spots caused by a Lysol-like substance. . . . After the prosecution rested, Dr. Younge testified in the criminal trial that Margaret admitted to him on February 24 that she had used Lysol to abort herself and that he saw twelve or thirteen necrotic areas caused by chemical burns. Before the Hearing Commission on direct examination, Dr. Younge stated he saw 'several areas of necrosis' (R. 217); but when he was reminded of his trial testimony on cross-examination, Dr. Younge said there were 'many' such areas (R. 246).

> "However, these necrotic areas, which Younge claimed were plainly visible throughout the vagina (R. 248) and which were so necessary to his Lysol-defense theory, were not present when Dr. Fischer examined the girl around midnight on February 27, although he looked for such marks (R. 194). Dr. Fischer testified unequivocally before the Hearing Commission that, had the necrotic areas been present on February 24, they would have been there on February 27 or 28. Yet he found none (R. 190-191)." (Transcript references in the foregoing quote have been changed to conform to the pages in the Record before this Court.)

From the foregoing, it may be seen that petitioner's defense (that the girl aborted herself) was rebutted by independent medical testimony in the administrative proceeding but not in the criminal trial. To attempt to apply the principles of res judicata and collateral estoppel under these circumstances would be tantamount to holding that this respondent was irrevocably bound by the evidence adduced by the prosecuting officials in the criminal case. It is submitted that this respondent had not only the right but the duty to seek, in the administrative forum designated by law, a determintion as to whether petitioner had performed such acts as to warrant the revocation or limitation of his right to practice medicine. A ruling to the contrary in the name of due process for the petitioner would prevent this respondent from performing one of its most important functions, the protection of the public from those who should not practice the healing arts.

Furthermore, in the instant case, the difference between the degree of proof necessary for conviction and that which was necessary to sustain the administrative finding, in and of itself, militates against any holding that the latter proceeding was barred by the acquittal in the former. It is therefore submitted that no federal question of substance exists and that the writ should not issue.

CONCLUSION

It is respectfully submitted that the foregoing demonstrates that there are no "special and important reasons" warranting the issuance of the writ of certiorari in this case, U. S. Sup. Ct. Rule 19, 28 U.S.C.A., that this case presents no federal question of substance not heretofore decided by this Court, and that the decision of the Supreme Court of Missouri herein is in complete harmony with prior decisions of this Court. It is therefore submitted that the writ should not issue.

Respectfully submitted,

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